

No. 2804

United States
Circuit Court of Appeals
For the Ninth Circuit.

DAVID JACOBS and ISAAC JACOBS,
Petitioners,
vs.

S. T. HILLS, as Trustee in Bankruptcy of the
Estate of DAVID JACOBS and ISAAC
JACOBS, Copartners Doing Business as
JACOBS BROS.,
Respondent.

In the Matter of DAVID JACOBS and ISAAC
JACOBS, Copartners Doing Business as
JACOBS BROS.,
Bankrupts.

**TRANSCRIPT OF RECORD IN SUPPORT OF
PETITION FOR REVISION**

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, a Certain Order
of the United States District Court for the
Western District of Washington,
Northern Division.

Names and Addresses of Counsel.

WALTER, SCHAFFNER, Esq.,

Attorney for Petitioner, 531 Lyon Building,
Seattle, Washington.

ROMAINE & ABRAMS,

Attorneys for Petitioner, Bellingham, Wash-
ton,

WETTRICK, ANDERSON & WETTRICK,

Attorneys for Respondent, Central Building,
Seattle, Washington.

HUDSON & MADISON,

Attorneys for Respondent, Bellingham, Wash-
ington. [1*]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 56.

Petition of Trustee for Delivery of Assets.

In the Matter of DAVID JACOBS and ISAAC
JACOBS, Copartners, Doing Business as
JACOBS BROS.,

Bankrupts.

Comes now S. T. Hills, Trustee herein, and re-
spectively shows the Court:

I.

That on the 2d day of June, 1915, the above-named
bankrupts were the owners and possessors of a cer-
tain retail clothing, men's furnishings and haber-

*Page number appearing at foot of page of original certified Record.

dashery store at Bellingham, Washington; an itemized list or inventory of the stock of goods, wares, merchandise and fixtures therein contained on June 2, 1915, has been filed herein and marked exhibit "A"; that said merchandise was of the value of Eighty-six Hundred Seventy-nine and 99/100 Dollars (\$8679.99) (the fixtures, 3000.00; book account, \$2096), invoiced at cost price; that said store was operated by said bankrupts, for a period of five days succeeding the date of said inventory, *i. e.*, until June 7th, 1915; that said bankrupts during the said five days sold there from merchandise not exceeding Four Hundred Dollars (\$400.00) in value; that thereupon the sheriff of Whatcom County seized and took possession of said store and merchandise and fixtures therein contained under writ of attachment on the 7th day of June, 1915, and continued said business until July 13th, 1915, selling therefrom at retail, at regular retail prices, merchandise of the value of Six Hundred Eighty-seven and 53/100 Dollars (\$687.53), thereby reducing said stock not to exceed Five Hundred Dollars (\$500.00) of its cost value; that thereupon [2] an adjudication of bankruptcy was made on July 13, 1915, and a receiver of the above-entitled estate was appointed in the person of Geo. A. Hansen, who immediately qualified, took charge of the estate and acted as receiver until the 2d day of August, 1915; that thereafter and in the due course of the bankruptcy proceedings herein, on the 2d day of Aug., 1915, S. T. Hills was duly elected trustee, and qualified as said

trustee, and is now the acting trustee of the above-named bankrupt estate.

II.

That the trustee made an inventory of the goods, wares and merchandise of the estate of the above-named bankrupts contained in said store of said bankrupts; an itemized list or inventory of said goods, wares and merchandise has been on file herein and marked Exhibit "B"; that the value of said merchandise was Forty-five Hundred Ninety and 91/100 Dollars (\$4590.91), invoiced at cost price and in exactly the same manner as the merchandise was invoiced in Exhibit "A"; that goods, wares and merchandise of the value of Thirty-one Hundred Eighty-nine and 08/100 Dollars (\$3189.08) have been wrongfully and unlawfully and fraudulently taken, removed and concealed from said store by the said David Jacobs and Isaac Jacobs, and that the said David Jacobs and Isaac Jacobs have in their possession and under their control goods, wares and merchandise of which the trustee herein is the owner and is entitled to the possession thereof.

III.

That said wrongful, unlawful and fraudulent removal and concealment of said merchandise by said bankrupts was part and parcel of an unlawful and fraudulent conspiracy upon the part of said bankrupts to cheat and defraud their creditors extending over a period of at least one year last past; that pursuant to said fraudulent conspiracy said bankrupts have operated said store in an extravagant manner calculated to dissipate the assets and have

sold considerable [3] merchandise for less than its cost value and for a song, and for the purpose of inducing wholesale merchants and jobbers to sell and deliver merchandise to them, and with the intent to deceive and defraud said vendors have made false financial statements in writing, and have delivered same to different mercantile establishments including R. G. Dun Co., with the result that many and diverse wholesalers and jobbers have parted with their merchandise relying upon said false and fraudulent financial statements.

WHEREFORE, petitioner as trustee herein respectfully prays the Court for an order directing the said David Jacobs and said Isaac Jacobs, and each of them, to turn over and deliver forthwith to the petitioner the said goods, wares and merchandise so concealed and withheld, and for such other and further relief as may to the court appear just and proper in the premises.

S. T. HILLS,
Petitioner.

State of Washington,
County of King,—ss.

S. T. Hills, being first duly sworn, on oath deposes and says: That, I am trustee herein, have read the foregoing instrument, know the contents thereof and believe the same to be true.

S. T. HILLS.

Subscribed and sworn to before me this 20 day of September, 1915.

[Seal] NELSON E. ANDERSON.
Notary Public in and for the State of Washington,
Residing at Seattle. [4]

[Endorsed]: Petition of Trustee for Delivery of Assets. Filed the 5th day of October, 1915, at 2:00 P. M. J. F. Moore, Referee. [5]

In the United States District Court for the Western District of Washington, Northern Division.

No. 56—IN BANKRUPTCY.

In the Matter of DAVID JACOBS and ISAAC JACOBS, Copartners, Doing Business as JACOBS BROTHERS,

Bankrupts.

Findings of Referee in Bankruptcy and Order for Delivery of Property and Accounting.

On the 5th day of October, 1915, the trustee of the above-entitled bankruptcy filed his petition before me, praying for a hearing and order directing and requiring the above-named bankrupts, David Jacobs and Isaac Jacobs, to account for and deliver certain goods, wares and merchandise to the petitioner, which said goods, wares and merchandise were alleged by the petitioner to be fraudulently and secretly carried away or sold by the bankrupts and unaccounted for by the bankrupts.

That the trustee is the owner of and entitled to the possession of said goods, wares and merchandise for the benefit of the creditors of said estate.

Notice of filing said petition was personally served with copy of the petition on each of the bankrupts at Bellingham, said District, on the 6th day of October, 1915, and pursuant thereto hearing was had before me on the 13th day of October, 1915, com-

mencing at 2 o'clock, P. M., the trustee appearing in person and by his attorneys, Nelson R. Anderson and E. C. Hudson, the bankrupts appearing in person and by Curtis E. Abrams, of Romaine & Abrams, their attorney;

The bankrupts by their counsel filed with me and submitted two separate motions; one to make the petition (paragraphs 1 and 11), more definite and specific in certain particulars therein mentioned; and the other to strike the third paragraph of the petition, on the ground that the allegations therein contained presented no pertinent or material issue on the petition. [6]

I denied the first motion and sustained the other of said motions; to which decisions and rulings the respective counsel duly excepted.

Various witnesses were produced, sworn and testified as well as the trustee and the bankrupts on said hearing.

Said matters were presented by counsel for the respective parties by oral argument and by written briefs filed with me.

After reading and considering all the testimony offered and the arguments and written briefs filed herein and all the circumstances surrounding the parties and connected with said cause;

I find from a preponderance of the evidence and the circumstances of the case, that the bankrupts had in their possession and under their control in their place of business at Bellingham, said District, goods, wares and merchandise, belonging to their estate, on the 31st day of May, 1915, which inven-

toried at the cost price the sum of \$8,679.99.

That said bankrupts, David Jacobs and Isaac Jacobs, bankrupts aforesaid, have secreted, have in their possession of said goods, wares and merchandise, so inventoried, and fraudulently and wrongfully retain and withhold the same from the custody of the trustee to the approximately value of \$3,189.00 or more; and fail, refuse and neglect to in any manner account for the same or for the proceeds of any sales thereof;

And, fail, refuse and neglect to render any satisfactory or any account thereof or therefor.

I find from all the testimony and circumstances appearing in this case that the bankrupts conducted their said business in such manner as to indicate a well-defined purpose to defraud their creditors.

I, therefore, conclude that it is proper and expedient to make an order according to the prayer of the petition and according to the foregoing findings.

IT IS THEREFORE, ORDERED, that David Jacobs and Isaac Jacobs, the above-named bankrupts, surrender, and deliver to S. T. Hills, trustee in bankruptcy herein, the goods, wares, and merchandise belonging to said estate of the approximate value of \$3,189.00, now in the possession or under the control of said bankrupts, or account to said trustee in the sum of approximately \$3,189.00, the value thereof, within and on or before the 10th day of February, 1916.

Made and signed on this 22d day of January, A. D. 1916.

(Signed) J. F. MOORE,
Referee in Bankruptcy. [7]

[Endorsed]: Order for Delivery of Property and Accounting. Filed the 22d day of Jany., 1916, at 3 o'clock P. M. J. F. Moore, Referee. [8]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 56.

In the Matter of DAVID JACOBS and ISAAC JACOBS, Copartners Doing Business as JACOBS BROS.,

Bankrupts.

Petition of Bankrupts for Review of Orders of Referee.

To the Honorable J. F. MOORE, Referee in Bankruptcy for the Above-entitled District and Division, at Bellingham, Therein.

Your petitioners, David Jacobs and Isaac Jacobs, copartners doing business as Jacobs Bros. respectfully represent, show and petition:

I.

That your petitioners were adjudicated bankrupts on July 13th, A. D. 1915, and that said proceeding was referred immediately thereafter to you for further proceedings therein in conformity with the Acts of Congress relating to bankruptcy.

II.

That on October 5th, 1915, the trustee of the estate of said bankrupts, filed in this proceeding his petition for the return and delivery of property of the alleged value of Three Thousand One Hundred

Eighty-nine and Four Hundredths (\$3,189.04) Dollars; that thereafter and after hearing had in the matter of said petition, your Honor, on the 22d day of January, A. D. 1916, made and entered an order therein directing said Bankrupts to deliver property to said trustee of the approximate value of Three Thousand One Hundred Eighty-nine and Four Hundredths (\$3,189.04) Dollars, which said order is now [9] on file in the records of said proceeding and reference to which is made as though herein fully set forth or hereto attached.

III.

That thereafter and on the 11th day of February, A. D. 1916, your Honor entered in said proceeding an order overruling and denying a petition presented by said bankrupts for a rehearing upon said original petition for the delivery and return of property aforesaid, which said order of February 11th, 1916, is in the files of said proceeding, and to which reference is made as though herein set forth or hereto attached.

IV.

That said order of January 22d, A. D. 1916, aforesaid was and is erroneous, in that same was not supported by a preponderance of evidence or any evidence sufficient to justify the making and entry of said order, and that said order, and the whole thereof, is contrary to the law in the premises governing said matter; that the making and entry of said order is contrary to the evidence adduced at said hearing and to the law governing said matter, and that said bankrupts, and each of them, have

suffered and will suffer great injury therefrom; that said order of February 11th, A. D. 1916, was and is erroneous, in that it is contrary to the law in the premises and contrary to the affidavit evidence produced in support of said petition for rehearing, upon which said order was based, and is a substantial denial to said bankrupts, and each of them, of the right to have a full and complete hearing, and to present all the evidence in support of their contentions available in said matter, [10] and that same has wrought great injury to said bankrupts.

WHEREFORE, your petitioners, the undersigned bankrupts, feeling aggrieved because of such orders, pray that same may be reviewed as provided in the bankruptcy law of 1898 and the general order XXVII by the Judge of the District Court of the United States, and that a full transcript of all files, records and the evidence in said proceeding be presented with this petition to said Court.

Dated this 18th day of February, A. D. 1916.

ROMAINE & ABRAMS,

Attorneys for Bankrupts.

United States of America,
State of Washington,
County of Whatcom,—ss.

Isaac Jacobs, being first duly sworn, on oath says: That he is one of the bankrupts named and described in the foregoing petition; that he has read the same, knows the contents thereof, and that the same is true.

ISAAC JACOBS.

Subscribed and sworn to before me this 18th day of February, A. D. 1916.

[Seal] C. E. ABRAMS,

Notary Public in and for the State of Washington,
Residing at Bellingham therein. [11]

Due service of the within petition acknowledged and a true copy thereof received at Bellingham, Washington, this 18th day of February, 1916.

HUDSON & MADISON,

WETTRICK, ANDERSON & WETTRICK,

Attorneys for Trustee.

[Indorsed]: Petition for Review of Orders of Referee. Filed in the United States District Court, Western District of Washington. Feb. 25, 1916. Frank L. Crosby, Clerk. By ———, Deputy.

[12]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 56.

In the Matter of DAVID JACOBS and ISAAC JACOBS, Copartners, Doing Business as JACOBS BROS.,

Bankrupts.

Petition of Trustee for Review of Orders of Referee.

Comes now S. T. Hills, trustee herein, and respectfully shows the Court:

I.

On the 5th day of October, 1915, trustee herein filed a petition with the Honorable J. F. Moore, one of the

referees of the above-entitled court, sitting at Bellingham, Washington, to recover from the bankrupts concealed merchandise belonging to the estate, valued at \$3,189.08.

The bankrupts filed no answer, but moved that paragraphs I and II be made more definite and certain, which was denied. Bankrupts excepted.

Bankrupts moved that paragraph III be stricken, which was granted. The trustee excepted. The referee in his findings, however, found that "the bankrupts conducted their said business in such manner as to indicate a well-defined purpose to defraud their creditors."

II.

The allegations of the trustee's petition were sustained by uncontradicted evidence before the Referee, as follows:

February 3, 1915 (S. F. 25), Jacobs Bros., had a net worth of \$19,784.15 (S. F. 36).

March 15, 1915, Jacobs Bros., had on February 3, 1915, a stock [13] of merchandise valued at \$17,642.40 and a net worth of \$19,784.15, according to a financial statement given R. G. Dun & Co. (Trustee's Ex. "B").

June 2, 1915, an *exact* inventory of the merchandise (S. F. 117, 118) was taken by a representative of the creditors (C. P. Stevens), who had from 12 to 15 years' experience in the general mercantile business (S. F. 107), with the consent of Jacobs Bros. (S. F. 108), assisted by Carrington, an employee of Jacobs Bros., an experienced man (S. F. 25), who had taken previous inventories for the bankrupts

(S. F. 112), in whom they had confidence (S. F. 25), and also assisted to some extent by David Jacobs, one of the bankrupts (S. F. 108, 115). Both Stevens and Carrington counted the quantities and both took down the cost price (S. F. 109, 115, 116). The cost mark was the cost mark of the bankrupts. The bankrupts were present at the time (S. F. 115). The inventory is on file, marked Trustee's Exhibit "C," and shows merchandise valued at \$8,679.99.

June 7, 1915, the sheriff of Whatcom County attached the business and placed in charge Deputy Sheriff William Gibson (S. F. 22). This deputy acted as receiver, conducted the business as a going concern, and employed the bankrupts as clerks, all by consent of all parties until July 14, 1915 (Stipulation).

During his administration the sales amounted to \$687.53 (S. F. 24).

Q. "The stock on the 14th (July) was the same stock that you received on the 5th (June), with the exception of these sales that were made?"

A. "So far as I can tell." (S. F. 24, 25.)

No goods were wrongfully taken out during that time. (S. F. 25.) Nor did the bankrupts intimate that any goods were taken out during the interim. (S. F. 26.) [14]

July 13, 1915, Joseph A. Hansen was appointed receiver by the bankruptcy court (S. F. 27). The receiver inspected the premises two or three times a day (S. F. 128).

One morning the receiver made his usual inspection; later, at about 10 A. M., a policeman advised him

that the front door was unlocked. He immediately went through the premises and saw that everything was all right; that nothing had been moved out; that the door was locked when he entered to make his inspection *earlier* in the morning (S. F. 28).

(Q.) "The stock which you received from the sheriff, was that the same stock that you turned over to Mr. Hills, trustee?"

(A.) "Yes" (S. F. 129).

August 2, 1915, S. T. Hills was elected trustee.

The trustee personally looked at the stock shortly afterward, taking possession through his attorney, Mr. Hudson, who received the keys (S. F. 129).

The trustee took the inventory made on June 2d, and went through the stock with a prospective buyer. They immediately noticed a vast discrepancy in quantities and could go no further (S. F. 130). This discrepancy was substantiated by the taking of a SECOND inventory on August 16, 1915. This inventory was taken by the same Stevens, assisted by the appraisers appointed by the bankruptcy court, who were experienced men (S. F. 119, 122). The inventory was taken in exactly the same manner as the first (S. F. 110). Both were *exact* inventories (S. F. 117, 118).

The June 2d inventory showed merchandise, \$8,679.99; the August 16th inventory showed merchandise, \$4,590.91; a *shortage of merchandise* of \$3,189.08 after making due allowance for sales of Jacobs Bros., between June 2d and June 5th in the sum of \$400.00 (S. F. 134) and an allowance of \$500.00 (cost price) made for sales [15] kept and

recorded by the sheriff (S. F. 123, 124).

The August 16th inventory was not taken immediately upon the qualification of the trustee on August 2d for the reason that the making of the inventory was an expensive work and the first was deemed sufficient (S. F. 134, 135).

Schedules filed by the bankrupt show merchandise, \$8,000.00; fixtures, \$3,000.00; accounts, \$2,000.00; equity real property, \$200.00; or a total of \$13,200.00; liabilities for merchandise, \$17,039.29, and a total liability of \$22,676.77.

During the whole time the store was under lock and key (S. F. 135). The rear of the store was fastened by an iron shutter door with the lever crossing it on the inside, and by a frame door inside of that (S. F. 25, 27, 135, 136).

SUMMARY.

	Merchandise.	Net Worth.
Feb. 3, 1915	\$	Feb. 3,\$19,784.15
June 2, 1915	8,679.99	
Shortage		
Feb. 3, 1915		
August 16, 1915	4,590.91	
Total Shortage		
Shortage accounted for		
Shortage unaccounted for..		
Feb. 3, 1915		
Schedules	18,000.00	Schedules:
Total Shortage		Debts 22,687.77
Shortage accounted for by sales	900.00	Assets 13,200.00
Shortage unaccounted for..		
June 2, 1915	8,679.99	
Aug. 16, 1915	4,590.91	
Shortage	4,089.08	Excess liabilities. 9,487.77
Shortage accounted for by sales		
Bankrupts\$400.00		Total shrinkage \$29,271.92
Sheriff 500.00	900.00	
Shortage unaccounted for.	\$ 3,189.08	

The bankrupts denied taking or concealing assets (S. F. 140,——), but offered no explanation of any kind whatsoever. They confessed they could not explain the shrinkage of a net worth of \$17,000.00 on February 3, 1915, to an actual deficit of over \$8,000.00 at the time of bankruptcy. The record shows: [16]

(Q.) "What became of the \$17,000.00?"

(A.) "I don't know."

(Q.) "You can't imagine what became of it?"

(A.) "No" (S. F. 36).

They confessed that they could not account how the stock was reduced from 17,000 in February to 8,000 on June 2d (S. F. 48).

The bankrupts generally answered questions relating to the business with "I don't know," "I don't remember," "I suppose so," "I presume so," "I don't care."

Isaac Jacobs testified that the inventory of February 3, 1915, was strictly guesswork (S. F. 5); that it was a rough guess (S. F. 5); that he couldn't remember what his liabilities were at any time during 1915 (S. F. 7); that he made no great effort to find out what his stock was because he didn't care (S. F. 23); that he guessed at the value of the fixtures in the sum of \$3,500.00 (S. F. 34, 35); that he didn't care if people relied upon his figures or not (S. F. 35).

The bankrupts testified they didn't know what the business amounted to per year during the last few years (S. F. 36, 37); that they kept no records of sales (S. F. 17, 37); never kept an expense account (S. F. 37); destroyed cancelled checks (S. F. 49); kept no record of money taken out for their indi-

vidual use (S. F. 37); kept no stock book (S. F. 53); no correspondence (S. F. 46); no books at all except a ledger (S. F. 55); didn't know the sales between June 2d and June 7th (S. F. 136); and did not keep the ledger up during recent times (S. F. 55); that he kept no record and hadn't any idea; nor could he remember whether sales were light or not (S. F. 137).

The record further disclosed that the bankrupt perjured himself in his schedules by listing his merchandise at \$8,000.00 when he did not know how much it amounted to and did not exercise his [17] independent judgment of same (S. F. 64), and again by listing his real estate equity at \$200.00 and admitting that there was no equity, and again by testifying that he paid his father \$1,000.00 in two installment payments when his father testified that the 1,000 was paid back in small payments of 25 and \$50.00.

The bankrupt was brazen and contemptuous in saying he would have put his merchandise in at \$10,000.00 if Stevens' first inventory had shown \$10,000.00; that he would have put it in at zero if Stevens' inventory had been zero (S. F. 64).

The bankrupt also made a false financial statement, thereby offending against the criminal statutes and criminal code of the State of Washington, and the Bankruptcy Act. The statement issued to R. G. Dun & Co., on March 15, 1915, placed a net equity valuation on the real property of \$9,000.00, and upon examination in open court bankrupt admitted that there was no equity in said estate and in his schedule placed a valuation thereon of \$200.00. The bank-

rupt admitted that the property was not worth now as much as when he purchased it for \$6,050 (S. F. 57).

They guessed the fixtures were worth \$3,500.00 altho they bought them by trading \$1,000.00 worth of shoes (S. F. 81).

The bankrupts admitted that they knew that the statement would be circularized (S. F. 28); that they didn't care if creditors would rely upon their guesses (S. F. 35).

The Dun reports were distributed and furnished to different cities (S. F. 103). Inquiries and replies were made from the home office (S. F. 104), to persons who were seeking to sell them goods (S. F. 105), or at least to persons who were anxious to know their financial condition (S. F. 106), either for mortgages, loans or sales of merchandise (S. F. 106). Hardeman Hat Company relied upon said financial statement, and the Dun report decided them to pass [18] the credit and was the controlling influence in determining credit actually extended said bankrupts (Deposition, pages 2 and 3).

The record discloses the usual charities of bankrupts to their relatives. A niece was given \$300.00 cash and checks for \$400.00 (Trustee's Exhibit —) in small payments (S. F. 78). An aunt in Sweden, \$100.00 (S. F. 79). The father of the bankrupt borrowed money as he needed it for his personal use and to pay his private debts.

The bankrupts did not deny that they had stated they would make the matter as expensive as possible for their creditors (S. F. 67).

III.

Counsel for the bankrupts admitted that no goods were wrongfully taken or misappropriated from the store of said bankrupts during the administration of the sheriff, receiver in bankruptcy, or trustee in bankruptcy between June 5th and August 16th.

IV.

That on the 22d day of January, 1916, the Honorable J. F. Moore, referee aforesaid, erroneously made an order that the allegations of the trustee's petition were sustained by a preponderance of the evidence, and failed to find that the allegations of said petition and the findings made by said referee were sustained by evidence convincing said referee beyond a reasonable doubt.

That said order was entered without notice to the attorneys for the trustee.

V.

That said order is erroneous for its failure to enter the findings of fact as contained in the Findings of Fact and Conclusions of Law No. I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV as proposed by the trustee.

VI.

That said order is erroneous for its failure to enter the conclusions [19] of law contained in conclusions of law proposed by the trustee.

VII.

That said order is erroneous in its direction that "approximately" \$3,189 worth of merchandise was concealed, and its provision in the alternative for delivery of merchandise or money.

VIII.

Said order is erroneous in its failure to contain directions found in trustee's proposed order.

IX.

That said order is erroneous in its failure to make such findings of fact, conclusions and order as the law requires in such case and under such circumstances, and is fundamentally a miscarriage of justice and based upon a misconception of the nature and purpose and such proceedings in this: That said procedure partakes of a *quasi* criminal procedure and not of a civil proceeding, as apparently conceived by said referee.

WHEREFORE petitioner prays for a review of the evidence and of the facts establishing the trustee's cause of action; of the findings of fact entered by the referee; of the proposed findings of fact, conclusions of law; of the ruling and order of said referee, praying that said findings of fact be superseded by the findings of fact, conclusions of law and order as proposed by the trustee, and that the referee be directed to enter, sign and make the proposed findings of fact, conclusions of law and order drawn by the trustee herein.

S. T. HILLS,
Trustee.

HUDSON & MADISON,
WETTRICK, ANDERSON & WETTRICK,
Attorneys for Trustee. [20]

State of Washington,
County of King,—ss.

Nelson R. Anderson, being first duly sworn, on oath

deposes and says: That he is one of the attorneys for trustee herein, has read the foregoing petition for review, knows the contents thereof and believes the same to be true; that said review is sought in good faith, is meritorious and well founded in law.

NELSON R. ANDERSON.

Subscribed and sworn to before me this 27th day of January, 1916.

[Seal] S. J. WETTRICK,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within petition this 21st day of February, 1916.

ROMAINE & ABRAMS,
Attys. for Bankrupts.

[Indorsed]: Petition for Review. Filed in the United States District Court, Western District of Washington. Feb. 25, 1916. Frank L. Crosby, Clerk. By —————, Deputy. [21]

United States District Court, Western District of Washington, Northern Division.

No. 56.

In the Matter of DAVID JACOBS and ISAAC JACOBS, Copartners, Doing Business as JACOBS BROTHERS.

Memorandum Decision.

Filed April 19, 1916.

WETTRICK, ANDERSON & WETTRICK,
of Seattle.

HUDSON & MADISON, of Bellingham, for
Trustee.

ROMAINE & ABRAMS, of Bellingham, for
Bankrupts.

NETERER, District Judge:

On March 15, 1915, bankrupts issued a financial statement to R. G. Dun & Co., from inventory of February 3d, as a basis for credit, claiming:

“Cash value of stock on hand”.....	\$17,642.40
Outstanding accounts	1,650.00
Cash on hand.....	1,098.15
Fixtures	3,500.00
“Prepaid Insurance”.....	60.00
<hr/>	
Total,.....	\$23,950.55

LIABILITIES.

For merchandise not due.....	812.50
For merchandise closed by note.....	2,344.00
Loans from bank.....	1,000.00

“Equity in real estate”.....	9,000.00
“Total worth in and out of business”.....	28,798.05
“Annual business”	39,211.60

After February 3d and before June 2d bankrupts purchased from various sources “about \$10,000.00 or \$11,000.00 worth of merchandise.” On June 2d an inventory was taken at the request of the Seattle Merchants & Credit Men’s Association, and \$8,679.99 worth of clothing and “hats and furnishings” was found in the store, fixtures \$3,000.00, and book accounts \$2,096.00. On June 5th an action was begun in the State court, attachment issued and levied upon the merchandise, and by stipulation of parties, the store was not closed, but bankrupts were permitted to carry on the business under the sheriff’s supervision until July 14th, when a receiver was appointed in the involuntary bankruptcy proceedings commenced after the action in the State court was begun, [22] and adjudication made on this day. The schedules filed by the bankrupt give a list of seventy-three creditors, and total indebtedness of \$22,559.03. On August 2d a trustee was elected, who qualified and took charge of the assets. Appraisers were appointed, and on August 16th an inventory was taken and \$4,590.99 worth of merchandise was found. The bankrupts sold while carrying on the business under the stipulation in the State court and turned over to the sheriff, \$687.53. The trustee thereafter presented a petition to the referee for delivery of concealed assets, and after a due hearing, the trustee and bankrupts presenting evidence, the referee, on February 10, 1916, rendered his written findings by “a

preponderance of the evidence" that the bankrupts wrongfully and fraudulently retained and had in their possession \$3,189.00 worth of merchandise. The trustee and bankrupts have each filed petitions for review, the trustee contending that the findings should have been beyond a reasonable doubt, and the bankrupt contending that the finding was not warranted by the evidence, and also asked permission to present further testimony. On March 16, 1916, a further petition was presented by the trustee praying the delivery of \$20,962.41 worth of merchandise, which, it is alleged, is wrongfully retained. A show cause order was issued returnable before the court at Bellingham, April 4th. A petition for discharge was filed by the bankrupt and objections filed by creditors. All of the petitions and objections were by the Court set for hearing before the Court at Bellingham and heard on April 4th and 5th.

The Court heard all of the evidence presented and carefully read all of the testimony taken before the referee. A consideration of this testimony convinces me beyond any question of doubt that the bankrupts did retain and fail to account for a sum not less than that found by the referee, \$3,189.00. The referee allowed \$400.00 for goods sold after June 2d and before adjudication, and \$500.00 as cost of goods sold after adjudication. The bankrupts contend that the finding was an approximation [23] and not based upon evidence, and that much more approximately was sold. However the subject is approached the bankrupts cannot complain, for the reason that if the merchandise was not in their possession, they

must be charged with the money value. *In re Lasky*, 163 Fed. 99. The losses on the sales, if that is the contention, cannot obtain for the few days, as the testimony of the bankrupt shows that the sales were inconsiderable covering a period of time immediately prior. Nor is it likely under the evidence that the merchandise sold after the adjudication was sold at a profit, and if so the allowance made by the referee would more than offset the difference. The testimony conclusively establishes the fact that the bankrupts received the merchandise contended for, and this being traced to the bankrupts, they must be held accountable for the goods, and the burden of proof is upon the bankrupts to satisfactorily explain the absence of the goods and to show where the money was expended. *Boyd v. Gluckich*, 116 Fed. 142; *In re Alphin & Lake Cotton Co.*, 134 Fed. 477, 480; *In re Royce Dry Goods Co.*, 133 Fed. 100; *Seigel v. Cortel*, 164 Fed. 691. The bankrupts fail to account for the moneys received for the sale of the goods or for the goods, and endeavor to satisfy the law by surmise and guess and estimate of expenditures, when the proof of expenditures made could be readily obtained. There are no vouchers presented which would justify the conclusion that the amount of money to be accounted for could have been expended, and if expended, vouchers could have been presented. Nor were any books kept in which these alleged items of expenditures were noted, and the Court is asked to conclude with relation to the expenditures of these enormous sums upon surmise and conjecture. There perhaps is no good reason why

the order of the referee may not have been made in the alternative where there is testimony which may tend to establish such conclusion. *Samel v. Dodd*, 142 Fed. 68. In the instant case the bankrupts were conducting special sales for a period of time and [24] had employed a number of clerks. From the testimony presented it would be a reasonable conclusion to find that the merchandise had been sold and this having been traced into the possession of the bankrupts and failing to account therefore, they should be charged with the value.

Five objections or specifications to discharge have been filed. Without discussing these *seriatim*, I think it is reasonable to conclude that no books were kept by the bankrupt as contemplated by the Bankruptcy Act. There is no record presented which chronicles the receipts and disbursements. It is also established, I think, beyond any question that the statement issued on the 15th of March, 1915, was issued as a basis of credit and was materially false, and that the bankrupts knew it to be false, and this statement, I likewise think, negatives the sworn testimony of the bankrupts that no books were kept, for the reason that the amount of the annual business is given as \$39,211.60, which could not be given unless books of account had been kept and which have not been produced. I think the testimony clearly establishes that at least one of the objecting creditors extended credit upon the basis of this statement. The equity in the real estate was also placed at \$9,000.00, which a short time afterward was found to be worth only \$200.00, and the bankrupts knew at the time the

statement was made that it was based upon a fictitious valuation. While there is testimony which leads to the conclusion that the bankrupts have in their possession sums in excess of the amount found by the referee, the testimony is not clear and convincing, and I think the petition for return of \$20,962.41 should therefore be denied.

An order may be entered denying discharge of the bankrupts and directing bankrupts to pay to the trustee the sum of \$3,189.00 within twenty days from the date of the order, or in the event an appeal is taken, within such time as may be directed after the appeal is determined.

JEREMIAH NETERER,

Judge. [25]

[Endorsed] : Memorandum Decision. Filed in the United States District Court, Western District of Washington. Apr. 19, 1916. Frank L. Crosby, Clerk. By Anna C. Smith, Deputy. [26]

In the United States District Court for the Western District of Washington, Northern Division.

NO. 56.

In the Matter of DAVID JACOBS and ISAAC JACOBS, Copartners, Doing Business as JACOBS BROS., Bankrupts.

Findings of Fact and Conclusions of Law.

The petition of S. T. Hills, trustee, alleging concealment of assets by the bankrupts of the value of \$3,189.08 having been heard by the Honorable J. F.

Moore, one of the Referees in Bankruptcy, sitting at Bellingham, Washington, and an order having been entered by said referee directing the bankrupts, and each of them, to surrender and deliver to said trustee chattels of the value of \$3,189.00; and a review having been sought from said order by the Trustee on the grounds that the Referee made findings sustained by a preponderance of the evidence, whereas said findings were sustained beyond all reasonable doubt and was in the alternative; and the bankrupts having also sought a review on the ground that the evidence did not sustain said findings; the Court having considered the testimony introduced before the Referee, having heard the argument of counsel, having considered the briefs submitted, and being fully advised in the premises, makes the following:

FINDINGS OF FACT.

I.

That on the 13th day of July, 1915, petitions therefor having been filed in the above-entitled court on the 13th day of June, 1915, David Jacobs and Isaac Jacobs, copartners, doing business under the name and style of Jacobs Bros., and each of them, were duly adjudged bankrupts, and an order of reference referring all matters arising in said bankruptcy proceedings to the Honorable J. [27] F. Moore, one of the Referees in Bankruptcy of said court, sitting at Bellingham, before whom all proceedings herein-after set forth were heard and determined was made and entered by the above-entitled court and the Hon. Jeremiah Neterer, one of the Judges thereof.

II.

That said bankrupts on the 5th day of June, 1915, and for many years prior thereto were engaged in the retail mercantile business, at 115 Holly Street, Bellingham, Washington, conducting a clothing, men's furnishings and haberdashery store containing men's and boys' suits, shirts, underwear, suspenders, hose, handkerchiefs, gloves, bathing suits, overalls, umbrellas, suit cases, suits, aprons, coats, quilts, hats, collars, leggins, overcoats, and the usual accessories and merchandise of stores so engaged in said general business.

III.

That on the 5th day of June, 1915, the sheriff of Whatcom County seized and took possession of the merchandise, fixtures and chattels of the bankrupts contained and being in that certain store of said bankrupts located at 115 Holly Street, Bellingham, Washington, and placed in charge thereof deputy sheriff, William Gibson; that said sheriff by his said deputy, William Gibson, by consent of plaintiff in said attachment proceedings in the Superior Court of the State of Washington for Whatcom County and of the said bankrupts acted to all intents and purposes as a receiver, conducted the business as a going concern and employed the said bankrupts as clerks; that said sheriff and said deputy continued to hold and possess said assets until the 14th day of July, 1915; that between June 5th and July 14th, 1915, the sales from said store of said bankrupts amounted to \$687.53; that the cost value thereof did not exceed the sum of \$500.00.

IV.

That on the 13th day of July, 1915, Joseph A. Hansen was appointed receiver by the above-entitled court; that he duly qualified [28] in the manner provided by law and acted as receiver of said bankrupts from July 13th, 1915, until August 2, 1915; that on August 2, 1915, S. T. Hills was duly elected trustee of the above-entitled estate, and ever since has been, and now is, the duly elected, qualified and acting trustee of said bankrupts and the above-entitled estate.

V.

That on June 2, 1915, exact inventories of the merchandise of said bankrupts then and there contained and being in the said store of said bankrupts located at 115 Holly Street, Bellingham, Washington were made by C. P. Stevens and one, Carrington, in the presence of said bankrupts, by and with the consent of said bankrupts, according to the cost mark placed upon said goods by said bankrupts, and that said merchandise so inventoried was of the value of \$8,679.99; that said Carrington was an employee of said bankrupts, who had taken previous inventories of said bankrupts; that bankrupt David Jacobs also assisted in the taking of said inventory.

VI.

That on August 16, 1915, an exact inventory of the merchandise then and there located and being in the store of said bankrupts, 115 Holly Street, Bellingham, Washington, was taken by the said Stevens assisted by appraisers appointed in the above-entitled matter by said referee, according to the cost price

marked on said goods by said bankrupts and in exactly the same manner as the inventory of June 2, 1915; that said merchandise was of the value of \$4,590.91.

VII.

That on and between the 2d day of June and the 5th day of June, 1915, both inclusive, the sales of the said bankrupts did not exceed the sum of \$400.00; that all of the merchandise and assets of said bankrupts contained in said store of said bankrupts, 115 Holly Street Bellingham, Washington, were faithfully and strictly preserved, maintained [29] intact and accounted for by said sheriff, said deputy sheriff, said receiver in bankruptcy, and by said trustee in bankruptcy, and each of them; that no merchandise or other chattels were wrongfully taken, misappropriated, stolen or removed from said store or said stock or at all from and between the said 5th day of June and the said 16th day of August, 1915, by said officers of said courts or by any other person.

VIII.

That making due allowance for the values of said merchandise sold by said bankrupts on and between the 2d day of June, 1915, and 5th day of June, 1915, both inclusive, and the sale of said sheriff and said deputy sheriff on and between the 5th day of June, 1915, and the 14th day of July, 1915, there is a shortage of merchandise of the value of \$3,189.00.

IX.

That on February 3, 1915, said bankrupts make a statement that they owned and possessed merchandise of the value of \$17,642.40, cash on hand \$1,098.15.

The evidence shows that after February 3, down to the 5th day of June, 1915, they received more than \$10,000.00 worth of merchandise from divers and sundry persons and creditors herein; that between February 3, 1915, and June 5, 1915, the moneys deposited in bank by said bankrupts amounted to \$6,480.59; that the schedules of said bankrupts show merchandise \$8,000.00; that February 3, 1915, said bankrupts had a net worth of \$19,784.15; that at the time of adjudication schedules show an actual deficit of \$9,476.77. The testimony is unsatisfactory as to what disposition was made of said merchandise.

[30]

X.

That the bankrupts, and each of them, have failed, neglected and refused to deliver and furnish the trustee herein any records showing receipts and disbursements and have not kept the books of account contemplated by the bankruptcy act.

XI.

That the foregoing facts and findings are based upon clear and convincing evidence, and the Court is satisfied beyond all reasonable doubt that at the time of the filing of said petitions in bankruptcy and ever since and at the present time that said David Jacobs and said Isaac Jacobs, and each of them, had and now have in their possession and under their control merchandise and chattels of the value of \$3,189.00 belonging to the above-entitled estate in bankruptcy, which assets the said David Jacobs and the said Isaac Jacobs, and each of them, have concealed and withheld and now conceal and

withhold from the trustee herein, and is further satisfied beyond all reasonable doubt of the present ability of said David Jacobs and said Isaac Jacobs, and each of them, to deliver said assets to the trustee herein.

Done in open court this 15th day of May, 1916.

JEREMIAH NETERER,

Judge. [31]

The Court having made the foregoing Findings of Fact, makes the following:

CONCLUSIONS OF LAW.

(1.) That said bankrupts, and each of them, have concealed and withheld, and now conceal and withhold, from the above-entitled estate in bankruptcy and the trustee thereof, merchandise and chattels of the value of \$3,189.00 and that said bankrupts, and each of them, have the present ability to deliver and surrender said merchandise and said chattels to the trustee herein.

(2.) That the trustee herein is entitled to the relief prayed for in his petition and to an order of the Court directing said bankrupts, and each of them, to deliver and surrender said merchandise and chattels of the value of \$3,189.00.

Done in open court this 15th day of May, 1916.

JEREMIAH NETERER,

Judge.

Copy of within findings and conclusions recd. and notice of presentation to Judge Neterer, May 15, 1916, 2 P. M., acknowledged this 11th day of May, 1916.

WALTER SCHAFFNER,

Atty. for Bankrupts.

[Indorsed]: Findings of Fact and Conclusions of Law. Filed in the United States District Court, Western District of Washington. May 15, 1916. Frank L. Crosby, Clerk. By Edith A. Handley, Deputy. [32]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 56.

In the Matter of DAVID JACOBS and ISAAC JACOBS, Copartners, Doing Business as JACOBS BROS.,

Bankrupts.

Order Directing the Bankrupts to Surrender and Deliver Concealed Merchandise.

This matter coming on regularly for hearing before the above-entitled court upon petition of the trustee and the bankrupts for a review of the findings and order of the Honorable J. F. Moore, one of the referees in bankruptcy, sitting at Bellingham, Washington, made and entered by said referee on the 22d day of January, 1916; the trustee appearing by his attorneys, Wettrick, Anderson & Wettrick and Hudson & Madison, and the bankrupts appearing by their attorneys, Romaine & Abrams and at the time of the entry of this order by an additional counsel in the person of Walter Schaffner; the Court having considered the evidence introduced by the parties before the referee, the argument of counsel, having considered the briefs submitted, having made findings of fact and conclusions of law, and

being fully advised in the premises,

IT IS HEREBY ORDERED that the said David Jacobs and the said Isaac Jacobs, and each of them, within 20 days after the date of the entry of this order, deliver and surrender to S. T. Hills, the trustee in bankruptcy herein, men's and boys' suits, shirts, underwear, suspenders, hose, handkerchiefs, gloves, bathing suits, overalls, umbrellas, suit cases, suits, aprons, coats, quilts, hats, collars, leggins, overcoats, of the kind formerly owned and possessed by said bankrupts in conducting that certain store of said bankrupts, at 115 Holly Street, Bellingham, Washington, of the value [33] of \$3,189.08, belonging to the said estate in bankruptcy herein, now in the possession and under the control of the said David Jacobs and the said Isaac Jacobs, and each of them; provided that if said bankrupts appeal from this order within 20 days of its entry that said bankrupts shall have 20 days after the disposition of said appeal to comply with said order.

Done in open court this 17th day of May, 1916.

JEREMIAH NETERER,

Judge.

Received copy of within order and service thereof acknowledged this 15th day of May, 1916.

WALTER SCHAFFNER.

[Indorsed]: Order Directing the Bankrupts to Surrender and Deliver Concealed Merchandise. Filed in the United States District Court, Western District of Washington. May 17, 1916. Frank L. Crosby, Clerk. By Edith A. Handley, Deputy.

[34]

Return on Service of Writ.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed court order on the therein named David Jacobs and Isaac Jacobs, copartners doing business as Jacobs Bros., by handing to and leaving a true and correct copy thereof with them, personally, at Bellingham, Wash., in said District on the 18th day of May, A. D. 1916.

JOHN M. BOYLE,
U. S. Marshal.

By Edward Williams,
Deputy.

Marshal's fees: \$12.45.

[Indorsed]: Filed in the U. S. District Court,
Western Dist. of Washington. May 18, 1916.
Frank L. Crosby, Clerk. Edith A. Handley,
Deputy. [35]

*United States District Court for the Western
District of Washington.*

No. 56.

In the Matter of DAVID JACOBS & ISAAC
JACOBS, as JACOBS BROS.,
Bankrupts.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript containing
petition of trustee to recover \$3,189, filed Oct. 5,

1915; order of referee thereon, entered Jan. 22, 1916; petitions of bankrupt and trustee for review thereof, filed ab't Jan. 27, 1916; opinion of Court filed April, 1916; findings and conclusions in re return of \$3,189, filed May 15, '16; order entered May 17, 1916.

WALTER SCHAFFNER,
ROMAINE & ABRAMS,
Attys. for Bkpt.

NOTICE.—Attorneys will please endorse their own Filings. Rule 11. [36]

[Indorsed]: Praeclipe for Process, etc. Filed in the United States District Court, Western District of Washington. May 25, 1916. Frank L. Crosby, Clerk. By Edith A. Handley, Deputy. [37]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 56.

In the Matter of DAVID JACOBS and ISAAC JACOBS, Copartners, Doing Business as JACOBS BROS., Bankrupts.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return, that the foregoing pages numbered from 1 to 37, inclusive, contain a full, true and correct transcript of proceedings and

record in the case of David Jacobs and Isaac Jacobs, copartners, doing business as Jacobs Brothers, Bankrupts, No. 56, pending in this court, as required by the praecipe of counsel filed in said cause, as the originals thereof appear on file in this office at Bellingham, Washington, in the district aforesaid.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid into my office, by and on behalf of the petitioner herein, for making the record, certificate and return to the United States Circuit Court of Appeals, for the Ninth Circuit, in the above-entitled cause, to wit: [38]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return, 77 folios @	
15c	\$11.55
Clerk's certificate to transcript—3 folios @	
15c45
Seal to said certificate20

	\$12.20

Attest my hand and the seal of the United States Disrtict Court for the Western District of Washington, at Bellingham, Washington, this 29th day of May, 1916.

[Seal]

FRANK L. CROSBY,
Clerk U. S. District Court. [39]

[Endorsed]: No. 2804. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of David Jacobs and Isaac Jacobs, Copartners Doing Business as Jacobs Bros., Bankrupts. David Jacobs and Isaac Jacobs, Petitioners, vs. S. T. Hills, as Trustee of the Estate of David Jacobs and Isaac Jacobs, Doing Business as Jacobs Bros., Bankrupts, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Western District of Washington, Northern Division.

Filed June 3, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

